FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EPIC GAMES, INC., *Plaintiff-counter-defendant-Appellant,* v. APPLE, INC., *Defendant-counter-claimant-Appellee.*	No. 21-16506 D.C. No. 4:20-cv-05640-YGR ORDER

EPIC GAMES, INC., *Plaintiff-counter-defendant-Appellee,* v. APPLE, INC., *Defendant-counter-claimant-Appellant.*	No. 21-16695 D.C. No. 4:20-cv-05640-YGR

Filed July 17, 2023

Before: SIDNEY R. THOMAS and MILAN D. SMITH, JR., Circuit Judges, and MICHAEL J. MCSHANE,* District Judge.

Order;
Concurrence by Judge M. Smith

ORDER

Apple's Motion to Stay the Mandate (Dkt No. 247) is GRANTED. Pursuant to Rule 41(d) of the Federal Rules of Appellate Procedure, the mandate is stayed for 90 days to permit the filing of a petition for writ of certiorari in the Supreme Court. Apple must notify the Court in writing that the petition has been filed, in which case the stay will continue until the Supreme Court resolves the petition. *See* Fed. R. App. P. 41(d)(2)(B)(ii). Should the Supreme Court grant certiorari, the mandate will be stayed pending disposition of the case. Should the Supreme Court deny certiorari, the mandate will issue immediately. The parties shall advise this Court immediately upon the Supreme Court's decision.

* The Honorable Michael J. McShane, United States District Judge for the District of Oregon, sitting by designation.

M. SMITH, Circuit Judge, concurring in the granting of the motion for a stay of the mandate pending the filing of a petition for certiorari:

Given our general practice of granting a motion for a stay if the arguments presented therein are not frivolous, I have voted to grant Apple's motion. *See United States v. Pete*, 525 F.3d 844, 850 (9th Cir. 2008) (it is "often the case" that our court stays the mandate while a party seeks certiorari). I write separately to express my view that, while the arguments in Apple's motion may not be technically frivolous, they ignore key aspects of the panel's reasoning and key factual findings by the district court. When our reasoning and the district court's findings are considered, Apple's arguments cannot withstand even the slightest scrutiny. Apple's standing and scope-of-the-injunction arguments simply masquerade its disagreement with the district court's findings and objection to state-law liability as contentions of legal error.

I. STANDING

Because Apple's anti-steering provision negatively affects the revenue Epic earns through the Epic Games Store, Epic had standing to seek injunctive relief against that provision pursuant to California's Unfair Competition Law (UCL), Cal. Bus. & Prof. Code § 17200 *et seq*.

To establish standing, a plaintiff must have "suffered an injury in fact that is concrete, particularized, and actual or imminent." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021). "[M]onetary harms" are one of the "[m]ost obvious" types of harm that satisfy the injury-in-fact requirement. *Id.* at 2204.

Epic has "three primary lines of business, each of which figures into various aspects of [this case]." *Epic Games, Inc. v. Apple, Inc.* (*Epic II*), 67 F.4th 946, 967 (9th Cir. 2023). First, Epic is a "video game developer—best known for the immensely popular *Fortnite*." *Id.* Second, Epic is the "the parent company of a gaming-software developer" (Epic International), which still has several apps on Apple's App Store. *Id.* Third, Epic is "a video game publisher and distributor," offering "the Epic Games Store as a game-transaction platform" on multiple devices. *Id.* at 968. In this last role, Epic is "a direct competitor" of Apple's App Store "when it comes to games that feature cross-platform functionality like *Fortnite*." *Id.*

As the panel opinion explained, the second and third lines of business—not the first—give rise to an injury in fact. *See id.* at 1000. As the parent company of Epic International, Epic is harmed because its subsidiary still has apps on the App Store that are subject to the anti-steering provision. As a games distributor, Epic is harmed because app developers cannot direct, with the promise of lower prices, their users to the Epic Games Store, which takes a significantly lower commission on app purchases than the App Store. As we explained: "[Epic] offers a 12% commission compared to Apple's 30% commission. If consumers can learn about lower app prices, which are made possible by developers' lower costs, and have the ability to substitute to the platform with those lower prices, they will [almost always] do so—increasing the revenue that the Epic Games Store generates." *Id.*

Such monetary loss is hornbook injury-in-fact, and Apple's arguments to the contrary misconstrue both our decision and the record. Apple asserts that Epic lacks standing because "Epic's developer program account has

been terminated," meaning Epic "has no apps on the App Store." But we did not conclude, as Apple's argument suggests, that Epic was injured in its role as a video game developer (*i.e.*, as the creator of the since-removed *Fortnite*). We recognized at the very start of our standing analysis that Apple had "terminated Epic's iOS developer account," and instead determined that Epic suffered an injury-in-fact in its role as a parent company and competing games distributor. *Id.* at 1000.

Regarding these two bases on which we actually determined standing, Apple offers only the conclusory statement that "no trial evidence or findings by the district court" support them. However, that assertion is simply false. Regarding Epic's role as the parent of Epic International, the record contains screenshots showing that Epic International still has six apps on the App Store, even though the parent company's developer account has been terminated.

The record is also filled with support for the common-sense proposition that Epic is harmed as a competing games distributor because consumers would shift some of their spending from the App Store to the Epic Games Store if developers could communicate the availability of lower prices on the latter. To begin, Apple's own internal documents conclude that two of the "most effective marketing activities" are "push notifications" and "email outreach," which are the two practices prohibited by Apple's anti-steering provision. *Epic Games, Inc. v. Apple Inc.* (*Epic I*), 559 F. Supp. 3d 898, 1054 (N.D. Cal. 2021); *see also Epic II*, 67 F.4th at 1001. Moreover, before the district court, Apple defeated Epic's proposed market definition for its Sherman Act claims based on the very kind of factual findings that it now claims are non-existent. The district court found that video games increasingly can be "ported

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